

Family Educational Rights and Privacy Act (FERPA)

Primary Rights of Students Under FERPA

- Right to inspect and review education records.
 - Right to seek to amend education records.
 - Right to have some control over disclosure of information from education records.
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34 CFR § 99.3 Definitions (Partial)

“Education records” are all records that:

- (1) contain information that is directly related to a student; and
 - (2) are maintained by an educational agency or institution or by a party acting for the agency or institution.
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34 CFR § 99.3 Definitions, cont.

- Exceptions to “education records” include:
 - Sole Possession Records
 - **Employment Records**
 - Law Enforcement Records
 - Health Records
 - Alumni Records
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34 CFR § 99.3 Education Records

- Teaching Assistants
 - California Public Employment Relations Board (PERB) seeking information about teaching assistants from the University of California
 - University advised FPCO that teaching assistants are employed as a result of status as a student.
 - FPCO advised that records relating to teaching assistants’ employment are education records.
 - Information sought is generally “directory information” but it cannot be disclosed linked to non-directory information, i.e. the fact that they are teaching assistants.
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34 CFR § 99.3 Education Records, cont.

- Teaching Assistants, cont.
 - PERB has subpoena power under State law.
 - Each student must be individually notified prior to disclosure.
 - Other options:
 - University could seek consent for disclosures to PERB when students apply for teaching assistant positions, or
 - University could mail materials to students that PERB would like to provide.
- A copy of the letter is available at the FPCO web site.
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34 CFR § 99.3 Definitions, cont.

“Directory information” is limited to those types of information which would not generally be considered harmful or an invasion of privacy if disclosed.

FERPA specifically notes that directory information could include:

Name	address
Telephone listing	date and place of birth
Major field of study	dates of attendance
Degrees and awards received	most recent previous school attended
Participation in officially recognized activities and sports	

34 CFR § 99.3 Definitions, cont.

- Directory Information cannot include:
 - *Social security number*/student ID number
 - Gender
 - Race/ethnicity/nationality
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34 CFR § 99.10 Right to Access Records

- Attorney-Client Privilege
 - Clark College (WA) student was denied access to an e-mail communication between the College president and another College employee based on a claim that it contained information subject to the attorney-client privilege.
 - FPCO determined that an educational institution may be viewed as an “inanimate entity,” in which decision-making powers may be diffused among several employees, and that attorney-client privilege should apply to communications which make relevant representatives of the institution aware of legal advice.
 - FPCO found no violation occurred in this instance.
A copy of the letter is available at the FPCO web site.
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34 CFR § 99.10 Right to Access Records, cont.

- Attorney-Client Privilege, cont.
 - Educational Institutional may withhold education records from student if such records are subject to attorney-client privilege. The school must show that:
 - 1) the asserted holder of the privilege is or sought to become a client;
 - 2) the communication is between a client and a member of the bar, or his or her subordinate, who is acting as a lawyer in connection with the communication;
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34 CFR § 99.10 Right to Access Records, cont.

- Attorney-Client Privilege, cont.
 - 3) the communication relates to facts disclosed by the client to the attorney for the purpose of securing either an opinion of law or legal services, and not for the purpose of committing an illegal act or tort;
 - 4) the communication is in fact confidential and not made in the presence of anyone outside the particular attorney-client relationship; and
 - 5) the privilege has been claimed and not waived.
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34 CFR § 99.10 Right to Access Records, cont.

- Berkeley School District denied access based on claim that parent sent request to wrong office and that records had already been provided to parent’s attorney.
 - FERPA requires that schools:
 - Respond to each request from a student for access within 45 days of receipt of the request, even if the records have been previously provided to the student or a representative of the student; and
 - Forward a request that was incorrectly submitted to the appropriate office or to appropriately redirect student making the request to the correct office, in a timely manner.
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34 CFR § 99.30 Prior Written Consent Requirement, cont.

A student shall provide a signed and dated written consent before an institution discloses personally identifiable information from the student's education records, except as provided in §99.31.

The written consent must –

- (1) Specify the records that may be disclosed;
 - (2) State the purpose of the disclosure; and
 - (3) Identify the party or class of parties to whom the disclosure may be made.
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34 CFR § 99.30 Prior Written Consent, cont.

- **Electronic Signatures**

Congress is currently considering legislation concerning the legal effectiveness and validity of electronic signatures.

FPCO is currently reviewing a standard for accepting electronic signatures. Once a decision has been made, we will provide further guidance as it relates to FERPA.

34 CFR § 99.30 Prior Written Consent, cont.

- **NCAA**
 - Students sign Student Athlete Statement permitting disclosure of education records to NCAA.
 - NCAA discloses information about student athletes when it issues investigative reports, waivers, and denial decisions and responds to subsequent questions from the public.
 - Student Athlete Statement did not provide consent for the release of personally identifiable information from education records by the NCAA to outside parties, such as the public and the media.
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34 CFR § 99.30 Prior Written Consent, cont.

- **NCAA, cont.**
 - March 12 and September 27, 1999 – FPCO advised NCAA how to modify consents to permit the NCAA to release information necessary to comply with NCAA reporting requirements.
 - Fall 1999 – NCAA officials advised FPCO that the suggested changes and the new consent forms were approved.
 - Consent modified:
 - Initial Eligibility Waiver Application
 - Student-Athlete Statement
 - Initial Eligibility Clearinghouse Student Release Form

Copies of the letters to the NCAA are available at the FPCO web site.

34 CFR § 99.31 Exceptions to prior written consent requirement

- **§ 99.31(a)(1) School Officials**
 - **§ 99.31(a)(3) Authorized Representatives**
 - **§ 99.31(a)(9) Subpoenas/Court Orders**
 - **§ 99.31(a)(11) Directory Information**
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34 CFR § 99.31(a)(1) School Officials

- Alumni Office

Student alleged that the University of Arizona improperly disclosed personally identifiable, non-directory information from education records to the Alumni Association.

Investigation showed that:

- A letter was sent to the student by the Alumni Office *on behalf of* the Alumni Association.
- Employees of Alumni Office are designated as school officials with legitimate educational interests by the University.
- FPCO found no violation.

A copy of the letter is available at the FPCO web site.

34 CFR § 99.31(a)(3) and 99.35 Authorized Representatives

- Data Collection
 - Wyoming Community College Commission is seeking access to specific personally identifiable non-directory information on students in attendance at the seven Wyoming Community Colleges.
 - Disclosures to WCCC as a State educational authority for the *audit or evaluation of education programs* are permissible so long as the information is used only for the purposes for which it was disclosed and destroyed when no longer needed.
 - FPCO is currently reviewing the relationship between FERPA and the Workforce Investment Act as that statute may pertain to disclosures of Information from education records to the Department of Employment.

A copy of the letter to the WCCC is available at the FPCO web site.

34 CFR § 99.31(a)(9) Subpoenas/Court Orders

- Discovery Requests
 - Framingham State College received a Request for Production of Documents in a civil suit brought by a rape victim against the attacker who was convicted of rape and imprisoned. Both the victim and attacker were students and sanctions were taken by the College for this and other assaults that occurred on campus.
 - FPCO advised that education records cannot be disclosed without the student's consent in order to respond to a discovery request.
 - A discovery request is not considered a lawfully issued subpoena or a court order.
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34 CFR § 99.31(a)(11) Directory Information

- Students Right to know – Transfer-Out Reporting
 - March 11, 1999 – National Student Loan Clearinghouse sent Dear Colleague Letter announcing new EnrollmentSearch service that institutions can use to get the information they need to meet the Graduation and Transfer-Out Rates Reporting Requirements of Student Right to Know and Campus Security Act.
 - June 2, 1999 – Clearinghouse requests that FPCO review EnrollmentSearch procedures for compliance with FERPA.
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CFR § 99.31(a)(11) Directory Information, cont.

- Transfer-Out Reporting, cont.
 - August 2, 1999 – FPCO advises Clearinghouse that schools may use EnrollmentSearch to obtain information on current enrollment or graduation status to meet the STRKCSA reporting requirements.
 - EnrollmentSearch uses only directory information to conduct search.
 - Clearinghouse will not release enrollment status information on those students who have opted out of directory information.
 - August 23, 1999 – FPCO advises Wyoming Community College that it can participate in EnrollmentSearch for the purpose of conducting a retention study.

Copies of the letters to the Clearinghouse and the WCCC are available at the FPCO web site.

Higher Education Amendments of 1998
Amendments to the Family Educational Rights and Privacy Act (FERPA)
20 U.S.C. § 1232g

20 U.S.C. § 1232 g(b)

Paragraph (1)

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of [the eligible student] to any individual, agency, or organization other than to the following –

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under conditions set forth in paragraph (3), *or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);*

Paragraph (6)

- (A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of a crime of violence (as that term is defined in section 16 of title 18), *or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such an institution against the alleged perpetrator of such crime or offense with respect to such crime.*
- (B) *Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.*
- (C) *For the purpose of this paragraph, the final results of any disciplinary proceeding –*
(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and
(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.
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20 U.S.C. § 1232 (g)(i)

Drug and alcohol violation disclosures

- (1) *In general – Nothing in this Act or the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.) shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student’s education records if –*
- (A) *the student is under the age of 21; and*
- (B) *the institution determines that the student has committed a disciplinary violation with respect to such use or possession.*
- (2) *State law regarding disclosure – Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a) of this section.*
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For technical assistance and advice to school officials:

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Phone: (202) 260-3887
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For *informal* requests for technical assistance, e-mail us at: FERPA@ed.gov

Visit our web site: **www.ed.gov/offices/OM/fpco/**